UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

LARON BURNS,

Defendant.

Criminal case no. 14-cr-20748 / 14-cr-20448

HON. LAURIE J. MICHELSON
United States District Judge

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION UNDER 28 U.S.C. § 2255

This Court should deny defendant's motion, in part. As it relates to his assertion regarding the improper calculation of the Sentencing Guidelines, Burns' claim is without merit and should be denied. As it relates to his claim that his attorney did not file a notice appeal, this Court should set the matter for a limited evidentiary hearing.

STATEMENT OF CASE

On March 18, 2014, a federal grand jury in the Northern District of Georgia returned an Indictment against Burns charging him with conspiracy to commit Hobbs Act robbery and armed bank robbery as a result of his participation in the robbery of Catoosa Teachers Federal Credit Union in Ringgold, Georgia. (#14-cr-

20748, R. 1: Consent to Transfer, 1-7). On July 31, 2014, after his consent, the government charged Burns with armed bank robbery, brandishing a firearm during and in relation to a crime of violence, and conspiracy to commit bank robbery, as a result of his participation in the robbery of First National Bank in Brighton, MI, and the robbery of Citizen's Bank in Mt. Morris, MI. (#14-20448, R. 13: Information, 36-40).

After being arrested in Michigan, Burns consented to transfer his Georgia case to Michigan for plea and sentencing under Rule 20. (R. 1: Consent to Transfer, 1-7).

On December 17, 2014, Burns pleaded guilty pursuant to a Rule 11 plea agreement. (R. 4: Plea Agreement, 18-51; R. 20: Plea Agreement, 62-95). The plea involved both the robbery in Georgia and the two robberies in Michigan. On April 23, 2015, the Court accepted the Rule 11 plea agreement and sentenced defendant to 219 months of incarceration. Judgment was entered on May 15, 2015. (R. 10: Judgment, 57-62; R. 24: Judgment, 102-108).

On May 2, 2016, Burns filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255. (R. 15: §2255 Motion, 72-89). In response, the government filed a motion seeking to have this Court waive the attorney client privilege between Burns and his counsel, (R. 19: Motion to Waive Attorney Client

Privilege, 93-99), which this Court granted. (R. 20: Order Granting Government's Motion to Waive Attorney-Client Privilege, 100-102). The government now responds to Burns' motion.

STATEMENT OF FACTS

On September 28, 2012, Laron Burns and Johann Thorns entered the First National Bank located at 9911 East Grand River Avenue in Brighton, Michigan. Both Burns and Thorns were armed with firearms and both wore facial coverings to prevent identification. Once inside the bank, Burns and Thorns entered the teller area and began demanding money; they were both displaying firearms. Burns and Thorns then took money from the teller drawers. After obtaining money from the tellers at gunpoint, Burns and Thorns fled the bank and entered a car waiting outside driven by Marktray Spearman. An audit of the bank's records revealed that group stole over $15,000.00. Within a half an hour of the robbery, law enforcement officers recovered the vehicle that the crew used in the robbery. Further investigation revealed that that vehicle had been stolen from a nearby apartment complex the evening prior. Law enforcement officers processed the vehicle for evidence and located Burns' DNA on the passenger front seat headrest.

On November 16, 2012, law enforcement officers interviewed Demario Banks regarding his involvement in a bank robbery. In October of 2012, Banks and an accomplice, Denzel Berry, robbed the Citizens Bank located at 6452 Pierson Road, Mt. Morris Township, Michigan. They forced bank tellers at gunpoint to turn over approximately $32,000.00. Banks explained that approximately one week prior to the robbery, two males contacted him and Berry and solicited them to rob the bank. Banks identified one of the individuals as Laron Burns. Banks explained that Burns and Johann Thorns discussed the robbery with him and Berry on several occasions during the days leading up to the robbery. Banks explained that Burns and Thorns provided the firearms for the robbery, along with some items to hide their identity during the robbery. Banks further advised that Burns and Thorns claimed that robbing banks was very easy and that they had scouted the Citizens Bank in advance of the robbery.

On December 20, 2012, Laron Burns and an accomplice entered the Catoosa Teachers Federal Credit Union in Ringgold, Georgia. Both Burns and his accomplice were wearing dark clothing, masks, gloves, and armed with what appeared to be firearms (but later discovered to be air pistols). Once inside, Burns and his accomplice brandished the air pistols and took the cellular phones of various customers. During the robbery, Burns jumped a teller counter, and while doing so knocked a female bank employee to the ground. This employee suffered a broken leg as a result of the Burns' actions. She was then forced to open the bank's safe. Burns and his accomplice stole over $165,000 during the robbery. Burns and his accomplice then fled from the bank. Burns and his accomplice abandoned their air pistols, gloves, and ski masks – as well as the stolen customer/employee cell phones – in a gas station trash can. Shortly after the robbery, law enforcement officers tracked one of the stolen cellular telephones to that garbage can. Scientific testing was conducted on the recovered items. Burns' DNA was located on an article of clothing recovered from the garbage can.

LAW AND ARGUMENT

Laron Burns asserts two claims of error in support of his collateral attack on his sentence. First, Burns claims that counsel was ineffective for failing to file an appeal. Second, he claims that counsel was ineffective for failing to properly advise him regarding the sentencing guidelines.

As it pertains to Burns' first claim (failure to file an appeal), the government suggests that this Court conduct a limited evidentiary hearing to determine whether Burns expressly requested that his counsel file a notice of appeal. Because his second claim is meritless, this Court should deny the balance of Burns' motion.

To prevail on a section 2255 motion, "a petitioner must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury's verdict." *Humphress v.*

United States, 398 F.3d 855, 858 (6th Cir. 2005) (internal citation omitted). Relief is warranted only where a petitioner has shown "the existence of a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure." *United States v. Todaro*, 982 F.2d 1025, 1030 (6th Cir. 1993).

Claims of ineffective assistance of counsel are analyzed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the United States Supreme Court held that to demonstrate ineffective assistance of counsel, a petitioner must show both that defense counsel's performance was deficient and that petitioner suffered prejudice as a result. *Strickland*, 466 U.S. at 687.

To prove deficient performance, a movant must show that his attorney made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. A movant may meet this burden by establishing that his attorney's representation "fell below an objective standard of reasonableness." *Id.* at 687-88. Under this test, judicial scrutiny of the attorney's performance is "highly deferential," consisting of a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at 689.

Typically, even if counsel's performance is deficient, courts must still find prejudice to the defendant before granting relief. "A court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 696.

Claim of Ineffective Assistance of Counsel for Failure to File an Appeal

In his first claim, Burns argues that his counsel was ineffective for failing to file a timely appeal. In *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), the Supreme Court held that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Flores-Ortega* further held, contrary to the general rule, that a defendant need not establish prejudice: "by instructing counsel to perfect an appeal, [a defendant] objectively indicated his intent to appeal and was entitled to a new appeal without any further showing." *Id.* at 485. Moreover, "even when a defendant waives all or most of his right to appeal, an attorney who fails to file an appeal that a criminal defendant explicitly requests has, as a matter of law, provided ineffective assistance of counsel that entitles defendant to relief in the form of a delayed appeal." *Campbell v. United States*, 686 F.3d 353, 360 (6th Cir. 2012). Thus, despite waiving his right to appeal, (R: 4, Plea Agreement, 28), Burns is entitled to file a delayed appeal if he can establish that he directed his attorney to file a notice of appeal. [1]

Constrained by the holding in *Campbell*, the government suggests that this Court hold an evidentiary hearing to determine whether Burns explicitly directed his counsel to file an appeal. Based on the government's contact with Burns' counsel, there is a factual dispute as to whether Mr. Burns requested that his attorney file an appeal within the applicable time limits. Specifically, Burns' counsel has no record or recollection of Burns making a specific and timely request to file a notice of appeal. Thus, an evidentiary hearing is appropriate. At the hearing, Burns would be required to show, by a preponderance of the evidence, that he expressly requested that his attorney file a notice of appeal. *Campbell*, 686 F.3d at 360; *see also Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006). If he satisfies that burden, then Burns should be granted a delayed appeal on the disputed issue. If not, then this Court should deny his motion.

[1] An appeal would be a breach of the terms of the Rule 11 plea agreement thereby potentially relieving the government of its obligations under the agreement.

Claim of Ineffective Assistance of Counsel for Improperly Advising Petitioner to Accept a Plea Offer

In his second claim, Burns argues that his counsel was ineffective for improperly advising him to accept a plea offer from the government. Specifically, Burns argues that counsel misadvised him as to the proper guideline calculation. Burns asserts that his counsel advised him that his sentencing guidelines would be 151 to 188 months, and suggests that the proper sentencing guidelines should be 154 to 171 months. Burns' arguments are incorrect and belied by the record. Accordingly, this claim should be denied.

First, Burns' calculation of the sentencing guidelines in his petition are incorrect. As outlined in Presentence Investigation Report, Burns' guidelines are 219 to 252 months, PSR ¶31-57, 105, not 154 to 171 months as he claims. As it relates to the conspiracy count, Burns neglects to add: i) 6 points for otherwise using a firearm under U.S.S.G. §2B3.1(b)(2)(B), and ii) 2 points for physical restraint under U.S.S.G. §2B3.1(b)(4)(B). As it relates to the Georgia robbery count, Burns neglects to add: i) 4 points for otherwise using a weapon under U.S.S.G. §2B3.1(b)(2)(D), and ii) 4 points for serious bodily injury under U.S.S.G. §2B3.1(b)(3). Burns also only added 1 point under the multiple account adjustment rather than 2 points. PSR ¶ 50. Further, although he sets forth his own idea of what the guidelines should be, Burns never explains how or why the calculations of the probation department and this Court were incorrect. Thus, Burns' claim that the guidelines were lower is incorrect and he has not carried his burden of proof to demonstrate otherwise.

Second, Burns knew and agreed that the guidelines were significantly higher than what he now claims. The Agreement, which defendant signed and acknowledged, anticipated a sentencing guideline range of 192 to 229 months.[2] (R: 4, Plea Agreement, 24; R. 20: Plea Agreement, 68). The Rule 11 plea agreement was unambiguous regarding the agreed upon guidelines. The defendant agreed that there were no guideline disputes and that the guideline range applicable to him was 192 to 229. (*Id.*). Importantly, defendant acknowledged having read (or been read) the entire Rule 11 plea agreement, understanding it, agreeing to its terms, being satisfied with his attorney's advice and representation, having a full and complete opportunity to confer with his attorney, and that all of his questions were answered by counsel. (R: 4, Plea Agreement, 31; R. 20: Plea Agreement, 75).

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[2] The Court determined the guidelines to be higher, at 252 to 294 months. PSR ¶ 105-107. However, since the Court sentenced Burns to 219 months, within the range contemplated by the Rule 11 plea agreement, he had no right to withdraw from the Agreement.

Further, during the plea colloquy the Court advised Burns that the sentencing guidelines would be 108 to 135 months plus an additional 84 months[3]. (R. 22: Sentencing Transcript, 158). Thus, any claim that he believed the guidelines to be anything other than what was set forth in the Rule 11 plea agreement and discussed at the plea colloquy is simply not supported, and if fact contradicted, by the record.

Third, the sentence that Burns received was within the range to which he agreed in the Rule 11 plea agreement. Alternatively stated, Burns got exactly what he bargained for. His plea agreement allowed for a sentence of between 192 and 219 months, and he was sentenced to 219 months. Thus, even if the Court found enhancements that the parties missed, his ultimate sentence was within the range contemplated by Burns. Moreover, given the correct guideline range of 219 to 252 months, Burns actually received a sentence at the very bottom of the sentencing guidelines, and within the range contemplated by the Rule 11 plea agreement. In other words, Burns suffered no prejudice.

[3] The Rule 11 plea agreement contains a mathematical error. The top of the sentencing guidelines should be 219, not 229 (135 +84 months). Since defendant was sentenced to 219 months, this error is of no consequence.

Lastly, not only is the claim that his attorney advised him that the sentencing guidelines would be 151 to 188 months belied by the record, this sort of claim is not grounds for ineffective assistance of counsel. *See Mix v. Robinson*, 64 Fed. Appx. 952, 956-7 (6th Cir. 2003), *quoting United States v. Gordon*, 4 F.3d 1567, 1570 (10th Cir. 1994) ("[a] miscalculation or erroneous sentence estimation by defense counsel is not a constitutionally deficient performance rising to the level of ineffective assistance of counsel.")

In sum, Burns' claim regarding the guidelines fails at every turn and should be denied.

CONCLUSION

This Court should deny Burns' claim regarding the sentencing guidelines and set the matter for a limited evidentiary hearing regarding the notice of appeal.

Respectfully submitted,

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Dated: January 3, 2017

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CERTIFICATION OF SERVICE

I hereby certify that on January 3, 2017, the foregoing document was electronically filed, by an employee of the United States Attorney's Office, with the Clerk of the Court using the ECF system, and I hereby certify that an employee of the United States Attorney's Office mailed by United States Postal Service the document to the following non-ECF participants:

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